

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TRAVIS BENWARE, On behalf of
 himself and all others similarly
 situated,

 Plaintiff,

 v.

 HUGO BOSS, U.S.A., Inc., a
 Delaware Corporation,,

 Defendant.

CASE NO. 12cv1527-MDD
 ORDER OF PRELIMINARY
 APPROVAL OF CLASS
 SETTLEMENT

Before the Court is Plaintiff's unopposed motion for preliminary approval of class settlement and provisional class certification pursuant to Fed. R. Civ. P. 23.

BACKGROUND

On June 21, 2012, Plaintiff Travis Benware, on behalf of himself and all others similarly situated, initiated this action by filing a class action Complaint against Defendant Hugo Boss, U.S.A., Inc. (ECF No. 1). Plaintiff alleged that Defendant violated the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g)(1), by failing to truncate the expiration date of payment cards on the electronically printed receipts it provides to customers at the point of sale. (Id. at 2).

On August 23, 2012, Defendant filed an Answer to the Complaint. (ECF No. 10). On December 3, 2012, the Court issued a Rule 26 scheduling order and

1 discovery commenced. (ECF. No. 17).

2 On April 12, 2013, a settlement conference was held and a settlement was
3 reached. (ECF No. 26). On July 23, 2013, the parties consented to the jurisdiction
4 of this Court for all purposes.

5 On July 26, 2013, Plaintiff filed the Unopposed Motion for Preliminary
6 Approval of Class Action Settlement and Certification of Settlement Class,
7 accompanied by the declaration of Plaintiff's counsel and several exhibits¹. (ECF
8 No. 38). Plaintiff requests the Court enter an order that: (1) preliminarily approves
9 the terms of the Settlement; (2) approves the form, the method and plan of notice of
10 the Settlement; (3) conditionally certifies the Class for settlement purposes; and (4)
11 schedules a Final Settlement Hearing and related dates at which the request for final
12 approval of the proposed Settlement and entry of Judgment will be considered.

13 **TERMS OF PROPOSED SETTLEMENT**

14 The proposed settlement class (the "Class") consists of "[a]ll customers of
15 Hugo Boss, U.S.A. Inc., who made a purchase at the Hugo Boss retail store in the
16 United States between June 4, 2018 and July 10, 2012, and received an
17 electronically printed receipt at the point of sale which did not truncate the
18 expiration date of the customer's credit card. Class Members do not include Hugo
19 Boss, U.S.A. Inc., its subsidiaries and affiliates, its officers, directors, employees,
20 any entity in which Hugo Boss, U.S.A., Inc. has a controlling interest, and the legal
21 representatives, successors, or assigns of any such excluded persons or entities. In
22 addition, Class Members do not include the Court or its staff, or the attorneys and
23 staff of counsel for Hugo Boss, U.S.A., Inc." (ECF No. 38-1 at 5).

24 **I. Class Benefits**

25 "[Defendant] will create a \$550,000.00 fund to provide gift cards valued at up
26

27 ¹Plaintiff submits the following exhibits: (1) Settlement Agreement and Release (Exh. 1); (2)
28 proposed Detailed Notice (Exh. 1-A); (3) proposed Summary Notice (Exh. 1-B); (4) proposed Postal
Notice (Exh. 1-C); (5) proposed Online Claim Form (Exh. 1-D); (6) proposed Printable Claim Form
(Exh. 1-E); (7) FACTA settlements (Exh. 2).

1 to \$25.00 which may be used toward the purchase of any retail product, clothing
2 item, or apparel sold at any Hugo Boss retail location in the United States or online
3 at www.hugoboss.com to each class member who submits valid claim form. The gift
4 cards will be stackable, meaning that any single customer may use multiple gift
5 cards in single purchase transaction. The gifts cards are also fully transferrable and
6 have no expiration date. The total aggregate value of the Gift Cards redeemed by
7 the Settlement Class will not exceed five-hundred fifty thousand dollars
8 (\$550,000.00). In the event more than twenty-two thousand (22,000) claims are
9 accepted, the total value of the gift cards distributed to the Class will be reduced on
10 a pro-rata basis. For example, in the event twenty-five thousand (25,000) claims are
11 accepted by the Claims Administrator, the total value of each individual Gift Card
12 would be reduced from twenty-five dollars (\$25.00) to twenty-two dollars
13 (\$22.00).” (ECF No. 38-1 at 8-9).

14 **II. Completing Claim Forms**

15 “Claim Forms must be made in writing and submitted to the Claims
16 Administrator under penalty of perjury. The Settlement Class Members must state
17 affirmatively in the Claim Form that they: (a) made purchase at a Hugo Boss retail
18 store in the United States within the class period; and (b) paid with a personal credit
19 card or debit card. Claim Forms must be returned to the Claims Administrator no
20 later than sixty (60) calendar days after the first issuance of the Class Notices. The
21 Claims Administrator shall make available on the settlement website (i.e.,
22 www.HugoBossClassAction.com) Claim Forms and notices and a frequently asked
23 questions (FAQ) section, to address inquiries of the Settlement Class with questions
24 about the claims process, and shall e-mail Claim Forms and notices to persons who
25 contact it and request such information.” (ECF No. 38-2 at 7).

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1 **III. Class Notice**

2 The Notice of Class Action Settlement will be provided through the following
3 methods:

4 **A. Email or Direct Mail Notice**

5 Not later than ten (10) calendar days after the Court enters its order granting
6 Preliminary Approval of Settlement, Defendant will notify Class Members of the
7 settlement via first class mail to the addresses in the "Customer Mailing Address
8 Distribution List." During the same ten day time frame, Defendant will notify Class
9 Members of the settlement via email to the email addresses in the "Customer Email
10 Distribution List." Defendant will pay for all costs associated with providing notice
11 to the Class. (ECF 38-2).

12 **B. Publication Notice**

13 Within thirty days after the Court enters its order granting Preliminary
14 Approval of Settlement, Defendant shall publish the notice in the national edition of
15 the USA Today newspaper on two weekdays in a one eighth (1/8) page space based
16 upon information in the Summary Notice. (Id.).

17 **IV. Right to Elect Not to Participate in Settlement**

18 Class Members who intend to opt out of the settlement must do so by sending
19 a written request for exclusion from the class to the Claims Administrator, such
20 notice to be postmarked on or before the Opt-Out and Objection Date. The written
21 request must contain the excluded person's name and address and must be signed by
22 that person; or electronically signed if returned via electronic mail. A Class
23 Member who desires to be excluded but who fails to comply with the opt-out
24 procedure set forth herein shall not be excluded from the class. The Claims
25 Administrator shall compile a list of all Class Members who timely send such a
26 written request for exclusion and provide a copy of that list to the Clerk of the Court
27 and to Class Counsel ten (10) calendar days before the Final Settlement Hearing.
28 (ECF No. 38-2 at 15).

1 **V. Right to Object to Settlement**

2 Any Settlement Class Member who does not opt-out and who wishes to
3 object to the Settlement must file a written Objection (“Objection”) with the Court,
4 and serve it upon Class Counsel and Counsel for Defendant. Such written statement
5 must be filed with Court and served on counsel for the parties no later than the Opt-
6 Out and Objection Date. To be considered valid, an Objection must provide: (1) the
7 name of the action; (2) the Settlement Class Member’s full name, address, and
8 telephone number; (3) all grounds for the objection, accompanied by any legal
9 support for the objection known to the objector or his or her counsel; (4) the identity
10 of all counsel who represent the objector, if any; and, (5) a statement confirming
11 whether the objector intends to personally appear and/or testify at the Final
12 Settlement Hearing. (ECF No. 38-2 at 15). Class Counsel shall respond to any
13 Objection in support of final approval not later than seven (7) days before the final
14 approval hearing. Class members who fail to file and serve timely written
15 objections in the manner specified above shall be deemed to have waived any
16 objections and shall be foreclosed from making any objection (whether by appeal or
17 otherwise) to the settlement. (ECF No. 38-2 at 16).

18 **VI. Opt Out Procedure**

19 Class Members who intend to opt out of the settlement must do so by sending
20 a written request for exclusion from the class to the Claims Administrator, such
21 notice must be postmarked on or before the Opt-Out and Objection Date. The
22 written request must contain the excluded person’s name and address and must be
23 signed by that person; or electronically signed if returned via electronic mail. A
24 Class Member who desires to be excluded but who fails to comply with the opt-out
25 procedure set forth herein shall not be excluded from the class. The Claims
26 Administrator shall compile a list of all Class Members who timely send such a
27 written request for exclusion and provide a copy of that list to the Clerk of the Court
28 and to Class Counsel ten (10) calendar days before the Final Settlement Hearing.

1 Any Class Member who successfully opts out of the Settlement shall be
2 deemed to have waived any rights or benefits under the Settlement and will have no
3 standing to object to the Settlement.

4 **VII. Consent Jurisdiction and Modifications to Settlement**

5 The Class representatives and the defendants have consented to the
6 jurisdiction of United States Magistrate Judge Mitchell Dembin for all purposes in
7 this case, pursuant to 28 USC § 636 (c), including approval of the settlement and the
8 entry of final judgment. All citations to this case in the notices and claim forms
9 shall be as follows: *Travis Benware v. Hugo Boss U.S.A., Inc.*, Case No. 3:12-cv-
10 1527-MDD.

11 The Court reserves the right to approve the Settlement with such
12 modifications, if any, as may be agreed to by Class Counsel and Counsel for Hugo
13 Boss U.S.A., Inc. and without future notice to the Settlement Class Members.

14 **VIII. Appointment of Class Representative and Class Counsel, Attorneys' Fees
15 and Incentive Award**

16 Plaintiff Travis Benware shall be provisionally appointed as the Class
17 Representative to implement the Parties' proposed Settlement in accordance with
18 the Settlement Agreement. Plaintiff's Counsel, Todd Carpenter of Carpenter Law
19 Group is appointed as Class Counsel. Plaintiff and Class Counsel must fairly and
20 adequately protect the Class' interests.

21 Hugo Boss has agreed not to oppose or cause any other person to oppose
22 Class Counsel's application for attorneys' fees, costs and expenses in an amount up
23 to, but not to exceed \$140,000.00. (ECF No. 38-2 at 8). Defendant shall pay such
24 award by wire transfer or check to Class Counsel within ten (10) calendar days after
25 Final Approval of the Settlement or the Court's final approval of attorneys' fees and
26 delivery to Defendant of all payment routing information and tax I.D. numbers for
27 Defendant and Class Counsel.

28 The parties agree to an incentive award to the Class Representative of

1 \$3500.00, to be paid not later than ten (10) calendar days after Final Judicial
2 Approval. (Id. at 9).

3 Defendant will pay its own attorneys' fees and costs and all costs incurred in
4 administering the settlement. (Id. at 8).

5 DISCUSSION

6 "Voluntary conciliation and settlement are the preferred means of disputed
7 resolution in complex class action litigation." *Smith v. CRST Van Expedited, Inc.*,
8 2013 WL 163293, at *2 (S.D. Cal. Jan. 14, 2013)(citing *Officers for Justice v. Civil*
9 *Service Com'n of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir.
10 1982)). But because "[t]he class action device...is [] susceptible to abuse and carries
11 with it certain inherent structural risks, ... class actions may be settled only with the
12 approval of the district court." *Officers for Justice*, 688 F.2d at 623; see also Fed. R.
13 Civ. P.23(e). "[A]pproval...involves a two-step process in which the Court first
14 determines whether a proposed class action settlement deserves preliminary
15 approval and then, after notice is given to class members, whether final approval is
16 warranted." *National Rural Telecommunications Cooperative v. DIRECTV, Inc.*,
17 221 F.R.D. 523, 525 (C.D. Cal. 2004).

18 Here, the Court is at the preliminary approval stage. This "initial decision to
19 approve or reject a settlement proposal is committed to the sound discretion of the
20 trial judge." *Officers for Justice*, 688 F.2d at 625. "Because class members will
21 subsequently receive notice and have an opportunity to be heard on the settlement,
22 th[e] Court need not review the settlement in detail at this juncture." *In re M.L.*
23 *Stern Overtime Litig.*, 2009 W.L. 995864, at *3 (S.D. Cal. April 13, 2009).
24 However, even at this preliminary stage, "a district court may not simply rubber
25 stamp stipulated settlements." *Kakani v. Oracle Corp.*, 2007 WL 1793774, at *1
26 (N.D.Cal. June 19, 2007) (citing *Staton v. Boeing Co.*, 327 F. 3d 938, 959-60 (9th
27 cir. 2003)). "Especially in the context of a case in which the parties reach a
28 settlement by agreement prior to class certification, courts must peruse the proposed

1 compromise to ratify both the propriety of the certification and the fairness of the
2 settlement.” *Staton v. Boeing*, 327 F.3d at 952.

3 “A party seeking to maintain a class action must be prepared to show that
4 Rule 23(a)’s numerosity, commonality, typicality and adequacy of representation
5 requirements have been met, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. ____, 131
6 S.Ct. 2541, and must satisfy through evidentiary proof at least one or Rule 23(b)’s
7 provisions.” *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1429 (2013) (citing *Wal-*
8 *Mart Stores, Inc. v. Dukes*, 564 U.S. ___, 131 S.Ct. 2541 (2013)). Here, Plaintiff
9 seeks certification of a settlement class pursuant to Fed. R. Civ. P. 23(b)(3).

10 **A. Numerosity**

11 First, a proposed class must be “so numerous that joinder of all members is
12 impracticable.” Fed. R. Civ. P. 23(a)(1). “Joinder need not be impossible, as long as
13 potential class members would suffer a strong litigation hardship or inconvenience
14 if joinder were required.” *Rannis v. Recchia*, 380 Fed. Appx. 646, 651 (9th Cir.
15 May 27, 2010) (citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909,
16 913-14 (9th Cir. 1964)).

17 Here, the parties assert that “[f]rom June 4, 2008 through July 10, 2012, Hugo
18 Boss allegedly conducted approximately 2,155,978 transactions in violation of 15
19 U.S.C. § 1681c(g)(1).” (Memo of P’s and A’s ISO Plaintiff’s Unopposed Motion for
20 Preliminary Approval of Class Action Settlement and Certification of Settlement
21 Class, ECF No. 38 at 16). Accordingly, the Court finds that it is reasonable to
22 conclude “the class is so numerous that joinder of all members is impracticable.”
23 Fed. R. Civ. P. 23(a)(1).

24 **B. Commonality**

25 Commonality requires that the class claims depend upon a common
26 contention...[and] must be of such a nature that it is capable of classwide
27 resolution....” *Wal-Mart Stores, Inc. v. Dukes*, __U.S. __, 131 S.Ct. 2541, 2551, 180
28 L.Ed.2d. 374 (2011). In this FACTA case, a class of similarly situated individuals

1 alleged that Defendant violated FACTA by printing the expiration dates of
 2 customers' credit or debit cards on electronically printed receipts. See 15 U.S.C. §
 3 1681c(g)(1).

4 Pursuant to Rule 23(b)(3) the Court finds that the allegations set forth in
 5 Plaintiff's complaint are common to the class members and predominate over any
 6 individual members claims, "and that a class action is superior to other available
 7 methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P.
 8 23(b)(3).

9 **C. Typicality**

10 The third Rule 23(a) prerequisite is typicality of claims. "[T]he claims or
 11 defenses of the representative parties are typical of the claims or defenses of the
 12 class." Fed. R. Civ. P. 23(a)(3). The claims of the class representative must be
 13 "reasonably coextensive with those of absent class members." *Hanlon v. Chrysler*
 14 *Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

15 Plaintiff alleges that he "made a purchase with a payment card at one of
 16 Defendant's stores in San Diego, California." (ECF 1 at 3-4). Plaintiff's receipt
 17 contained the last four digits of his credit card number and the four-digit expiration
 18 date of his credit card. (Id. at 4). Similarly, the proposed settlement class is
 19 comprised of individuals who made a credit card or debit card purchase at a Hugo
 20 Boss, U.S.A., Inc. retail store in the United States between June 4, 2008 and July 10,
 21 2012. (ECF No. 38 at 1). No claim has been raised by Plaintiff that is unique to
 22 himself. Accordingly, the Court finds the typicality prerequisite has been
 23 preliminarily satisfied.

24 **D. Adequacy**

25 "Rule 23(a)(4) permits the certification of a class action only if the
 26 'representative parties will fairly and adequately protect the interests of the class.'" *Staton v. Boeing*, 327 F. 3d. at 957. "To determine whether the representation meets
 27 this standard, we ask two questions: (1) Do the representative plaintiffs and their
 28

1 counsel have any conflicts of interest with other class members, and (2) will the
 2 representative plaintiffs and their counsel prosecute the action vigorously on behalf
 3 of the class?” *Id.* Counsel for Plaintiff has submitted a declaration outlining his
 4 experience prosecuting complex consumer actions. (See Carpenter Decl. ¶11, ECF
 5 No. 38-4 at 2.) Based upon the record before the Court, it appears that neither
 6 Plaintiff nor his counsel have any conflict of interest with any other class member.
 7 The Court finds the adequacy prerequisite has been preliminarily satisfied.

8 **E. Predominance and Superiority**

9 In addition to meeting all four of the Rule 23(a) prerequisites, Plaintiff
 10 must also meet one of the Rule 23(b) requirements. As previously stated, Plaintiff
 11 seeks certification pursuant to Rule 23(b)(3): (1) “the questions of law or fact
 12 common to class members predominate over any questions affecting only individual
 13 members,” and (2) “a class action is superior to other available methods for fairly
 14 and efficiently adjudicating the controversy.” *Id.*

15 Predominance concerns whether “questions of law or fact common to the
 16 class will predominate over any questions affecting only individual members as the
 17 litigation progresses.” *Amgen*, 133 S. Ct. at 1195. In Plaintiff’s unopposed motion
 18 for preliminary approval of class settlement, Plaintiff asserts the proposed
 19 settlement satisfies the predominance requirement because “Class Members are
 20 entitled to the same legal remedies premised on the same alleged wrongdoing.”
 21 (Memo of P’s & A’s, ECF No. 38 at 19). “The central issue for every claimant is
 22 whether they made a purchase at a Hugo Boss retail store with a payment card and
 23 received an electronically printed receipt without the expiration date of their
 24 payment card truncated.” (*Id.*) On these facts, the Court finds that the Rule
 25 23(b)(3) predominance requirement has been preliminarily established.

26 The Court must next consider whether “a class action [would be]
 27 ‘superior to other available methods for fairly and efficiently adjudicating the
 28 controversy.” *Colin v. Jaguar Land Rover North America, LLC*, 619 F.3d 1168,

1 1175 (9th Cir. 2010) (quoting Fed. R. Civ. P. 23(b)(3))). Whether class certification
2 is the superior method for adjudicating class members' claims, the four factors
3 enumerated in Rule 23(b)(3) must be considered: (a) the class members interests in
4 controlling litigation, (b) the nature of litigation, (c) the desirability of concentrating
5 the litigation of the claims, and, (3) the manageability of the class. "[Consideration
6 of these factors requires the court to focus on the efficiency and economy elements
7 of the class action so that cases allowed under subdivision (b)(3) are those that can
8 be adjudicated most profitably on a representative basis." *Zinser v. Accujix*
9 *Research Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001).

10 In this case, the small amount of money involved and the expense
11 associated with each class member prosecuting a separate case makes it highly
12 unlikely that individual litigation would be undertaken. "Where damages suffered
13 by each putative class member are not large, this factor weighs in favor of certifying
14 a class action." *See id.* at 1190. A class action would offer those with small claims
15 the opportunity for meaningful redress. Here, the Court finds that the Rule 23(b)(3)
16 superiority requirement has been preliminarily established.

17 The Court grants preliminary certification of the proposed settlement
18 class.

19 **III. Fairness of the Proposed Settlement**

20 The Court must carefully consider "whether a proposed settlement is
21 fundamentally fair, adequate, and reasonable," understanding that "[i]t is the
22 settlement taken as a whole, rather than the individual component parts, that must
23 be examined for overall fairness...." *Staton v. Boeing Company*, 327 F.3d 938, 952
24 (9th Cir. 2003) (internal citations omitted). "In making this appraisal, courts have
25 broad discretion to consider a range of factors such as 'the strength of the plaintiffs'
26 case; the risk, expense, complexity, and likely duration of further litigation; the risk
27 of maintaining a class action status throughout the trial; the amount offered in
28 settlement; the extent of discovery completed and the stage of the proceedings; the

1 experience and views of counsel; the presence of a governmental participant; and
 2 the reaction of the class members to the proposed settlement.” *Id.* at 959 (internal
 3 citations omitted). “The relative importance to be attached to any factor will depend
 4 upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief
 5 sought, and the unique facts and circumstances presented by each individual case.”
 6 *Officers for Justice v. Civil Service Commission of San Francisco*, 688 F.2d 615,
 7 625 (9th Cir. 1982).

8 “The first step in district court review of a class action settlement is a
 9 preliminary, pre-notification hearing to determine whether the proposed settlement
 10 is ‘within the range of possible approval.’” *Gautreaux v. Pierce*, 690 F. 2d 616, 621
 11 ftnt 3 (7th Cir. 1982). The purpose of Rule 23(e) is to protect the unnamed members
 12 of the class from unjust or unfair settlements affecting their rights. *See Davis v. City*
 13 *and County of San Francisco*, 890 F.2d 1438, 1444 n. 5 (9th Cir. 1989).

14 At this juncture, Plaintiff’s counsel has sufficiently demonstrated that the
 15 procedure for reaching this settlement was fair and reasonable. Weighing all the
 16 factors in favor of preliminary approval, the Court finds the settlement is within the
 17 range of possible approval. This preliminary determination establishes an initial
 18 presumption of fairness. *See In re General Motors Corp. Pick-up Truck Fuel Tank*
 19 *Products Liability Litigation*, 55 F.3d 768, 785 (3rd Cir. 1995).

20 **IV. Notice**

21 Plaintiff has provided the proposed Detailed Class Notice, Summary
 22 Class Notice, Summary Postcard Class Notice, Publication Notice, Online Claim
 23 Form, and Printable Claim Form (Pl. Exhs A, B, C, D, E, ECF No. 38-2 at 20-38),
 24 which are satisfactory to the Court in all respects except one.

25 The Settlement Administrator shall make available an electronic copy of
 26 this preliminary approval Order in a prominent location on the Settlement Website.
 27 The Settlement Administrator shall include a statement, in a prominent location on
 28 the Detailed Class Notice, Summary Class Notice, Summary Postcard Class Notice,

1 Publication Notice and claim forms, informing the putative class members that a
2 copy of this Order is available on the Settlement Website.

3 In all other respects, the Court finds that the Notices are reasonably
4 calculated to adequately apprise Class Members of (a) the pending lawsuit, (b) the
5 proposed settlement, and (c) their rights, including the right to either participate in
6 the settlement, exclude themselves from the settlement, or object to the settlement.

7 CONCLUSION

8 IT IS HEREBY ORDERED that the Unopposed Motion for Preliminary
9 Approval of Class Action Settlement (ECF No. 38) filed by Plaintiff Travis
10 Benware is GRANTED as follows:

- 11 1. The Settlement Agreement (Pl. Exh.1, ECF No. 38-2 at 1) including the
12 Detailed Class Notice, Summary Class Notice, Summary Postcard Class
13 Notice, Publication Notice and claim forms attached to the Settlement
14 Agreement as Exhibits A-E (Id. at 20-38), are preliminarily approved;
- 15 2. The Class is provisionally certified as a class of all persons who made a
16 credit card purchase at a Hugo Boss store in the United States during the
17 period from June 4, 2008 and July 10, 2012, and received an
18 electronically printed receipt at the point of sale which did not truncate
19 the expiration date of the customer's credit card.
- 20 3. Defendant Hugo Boss U.S.A. will notify Class Members of the
21 settlement in the manner specified under Section 3.1 and 3.2 of the
22 Settlement Agreement. Defendant will pay all costs associated with
23 claims administration and providing notice to Class Members. No later
24 than ten (10) calendar days before the filing date of Plaintiff's
25 application or motion in support of the Final Approval Order and
26 Judgement, Defendant is to provide Plaintiff with a declaration or
27 declarations from the Settlement Administrator confirming that the
28 notice has been provided in accordance with paragraph 3.5 of the

1 Settlement Agreement;

2 4. The Settlement Administrator shall make available an electronic copy of
3 this preliminary approval Order in a prominent location on the
4 Settlement Website. The Settlement Administrator shall include a
5 statement, in a prominent location on the Summary Class Notice,
6 Summary Postcard Class Notice, Publication Notice and claim forms,
7 informing putative class members that a copy of this Order is available
8 on the Settlement Website.

9 5. Class Members who want to receive a gift card under the Settlement
10 Agreement must accurately and completely fill out a Claim Form and
11 submit it to the Claims Administrator electronically or by U.S. mail
12 within sixty (60) days after the first issuance of the Class Notices.
13 Timeliness of a Claim Form shall be determined by the date postmarked
14 by the postal service or other expedited delivery service, or, if submitted
15 electronically through the Settlement Website, the date the Settlement
16 Administrator receives the Claim Form, as evidenced by the transmission
17 receipt.

18 6. Class Members who have not submitted a timely written exclusion
19 request pursuant to paragraph 8 below who want to object to the
20 Settlement Agreement must file a written objection and or/ a Notice of
21 Intention to Appear with the Court, and serve copies on Class Counsel
22 and Defendant's Counsel no later than sixty (60) calendar days after the
23 date of this Order. The Objection must state: (a) the Settlement Class
24 Member's full name, current, address and telephone number; (b) state
25 that the Settlement Class Member objects to the Settlement, in whole or
26 in part; (iii) set for the legal and factual bases for the objection; and (iv)
27 Serve copies of the objection on Plaintiff's counsel and Defendant's
28 counsel. Any Settlement Class Member who wishes to object and appear

1 at the final approval hearing in person instead of submitting only written
2 objections must include in the written objection a notice of intention to
3 appear at the final approval hearing. Class Counsel is to respond to any
4 Objections and file any additional materials in support of final approval
5 no later than seven (7) days before the final approval hearing.

6 7. Class Members who fail to object to the Settlement Agreement will: (1)
7 be deemed to have waived their right to object to the Settlement
8 Agreement; (2) be foreclosed from objecting to the Settlement
9 Agreement; and (3) not be entitled to speak at the Fairness Hearing.

10 8. Class members who want to be excluded from the settlement must send a
11 written request to the Claims Administrator postmarked on or before the
12 Opt-Out and Objection Date. The written request must contain the
13 excluded person's name and address and must be signed by the person
14 requesting exclusion. A Class Member who desires to be excluded but
15 who fails to comply with the opt-out procedure set forth herein shall not
16 be excluded from the class. The Claims Administrator shall compile a
17 list of all Class Members who timely send such a written request for
18 exclusion and provide a copy of that list to the Clerk of the Court and to
19 Class Counsel ten (10) calendar days before the Final Settlement
20 Hearing.

21 9. Plaintiff Benware is conditionally certified as the Class Representative to
22 implement the Parties' settlement in accordance with the Settlement
23 Agreement. Carpenter Law Group is appointed as Class Counsel.
24 Plaintiff and Class Counsel must fairly and adequately protect the Class'
25 interests;

26 10. If the Settlement Agreement terminates by its terms for any reason, the
27 following will occur: (a) this Order will be vacated; (b) class
28 certification will automatically be vacated. Plaintiff will stop functioning

1 as class representative and Class Counsel will revert to interim class
2 counsel; and (c) this Action will revert to its previous status in all
3 respects as it existed immediately before the Parties executed the
4 Settlement Agreement.

5 11. Nothing in this Order, the Settlement, or the Settlement Agreement, is or
6 may be construed as, an admission or concession on any point of fact or
7 law by or against any Party.

8 12. Final Approval Hearing. A Final Approval Hearing shall be held before
9 this Court on **January 30, 2014 at 3:00 p.m.**, this Court will hold a
10 Fairness Hearing to determine whether the Settlement Agreement should
11 be finally approved as fair, reasonable, and adequate. All papers
12 supporting Final Approval of the Settlement Agreement must be filed no
13 later than fourteen (14) calendar days before the Fairness Hearing. This
14 court may order the Fairness Hearing to be postponed, adjourned, or
15 continued. If that occurs, Defendant will not be required to provide
16 additional notice to Class Members.

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18 DATED: October 8, 2013

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21 Hon. Mitchell D. Dembin
22 U.S. Magistrate Judge
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